LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAY 10 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1445

JOHN J. McDONOUGH, ET AL.,
PETITIONERS,

v.

TALLULAH MORGAN, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

LAURENCE S. FORDHAM, J. HAROLD FLANNERY, JOHN LEUBSDORF
(FOLEY, HOAG & ELIOT);

ROBERT PRESSMAN, ERIC E. VAN LOON
(CENTER FOR LAW & EDUCATION);

RUDOLPH F. PIERCE
(KEATING, PERRETTA & PIERCE);

NATHANIEL R. JONES (N.A.A.C.P.)

FOLEY, HOAG & ELIOT
10 Post Office Square, Boston, Mass. 02109

Blanchard Press, Inc., Boston, Mass. — Law Printers

TABLE OF CONTENTS

	Page
Argument	2
1. The Lower Courts Disclaimed Any Power to Seek Educational Improvement for Its Own Sake	3
2. Measures Challenged by the Petition Directly Promoted Desegregation of Student Assignments	5
3. Measures Challenged by the Petition Secured Enforcement of the District Court's Plan and the Removal of Lingering Discrimination	8
4. The Court of Appeals Decision Here Does Not Conflict With *Keyes* v. *School Dist. No. 1,* 521 F.2d 465 (10th Cir. 1975)	11
5. The Petition Attempts to Assert Claims Not Raised on the Record in This Case	12
6. No Issue Warranting This Court's Consideration Is Raised	13
Conclusion	15

TABLE OF CITATIONS

Cases

Bradley v. *Richmond School Bd.,* 416 U.S. 696 (1974)	11
Brown v. *Bd. of Educ.,* 347 U.S. 483 (1954)	15
Brown v. *Bd. of Educ.,* 349 U.S. 294 (1955)	5
Brown v. *Bd. of Educ. of Bessemer,* 432 F.2d 21 (5th Cir. 1971)	10
Davis v. *Board of School Commissioners,* 402 U.S. 33 (1971)	16
Green v. *County School Bd.,* 391 U.S. 430 (1968)	6, 7
Gilmore v. *City of Montgomery,* 417 U.S. 556 (1974)	8, 13
Griffin v. *County School Bd.,* 377 U.S. 218 (1964)	8
Hart v. *Community School Bd.,* 383 F. Supp. 699 (E.D. N.Y. 1974), *aff'd,* 512 F.2d 37 (2nd Cir. 1975)	6, 7

C THROUGH POOR COPY

Page

Hills v. *Gautreaux*, 44 U.S.L.W. 4480 (1976) ... 11, 14, 16
Int'l Salt Co. v. *United States*, 332 U.S. 392 (1947) .. 14
Keyes v. *School Dist. No. 1*, 413 U.S. 189 (1973) ... 6, 16
Keyes v. *School Dist. No. 1*, 521 F.2d 465 (10th Cir. 1975), *cert. denied*, —— U.S. —— (1976) (No. 75-701) 11
Lau v. *Nichols*, 414 U.S. 563 (1974) 12
McLaurin v. *Oklahoma State Regents*, 339 U.S. 637 (1950) 8
Milliken v. *Bradley*, 418 U.S. 717 (1974) 15
Rogers v. *Paul*, 382 U.S. 198 (1965) 8
School Committee of Boston v. *Bd. of Educ.*, 1973 Mass. Adv. Sh. 1315, 302 N.E.2d 916 4
Swann v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) 4, 5, 7, 13, 16
United States v. *Barnett*, 376 U.S. 681 (1964) 8
United States v. *Griffin*, 525 F.2d 710 (1st Cir. 1975) .. 9
United States v. *Montgomery County Bd. of Educ.*, 395 U.S. 225 (1969) 11
United States v. *Scotland Neck City Bd. of Educ.*, 407 U.S. 474 (1972) 4
United States v. *Texas Education Agency*, 476 F.2d 848 (5th Cir. 1972) 16
Wright v. *Council of the City of Emporia*, 407 U.S. 451 (1972) 5, 8

Other Authorities

20 U.S.C. § 1606(a) 8
20 U.S.C. § 1713(f) 7
45 C.F.R. § 181.4(c)(9) 9
Mass. G.L. c. 71, §§ 87I-37J 6
U.S. Comm'n on Civil Rights, Desegregating the Boston Public Schools: A Crisis in Civic Responsibility (1975) 9

In the
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1445

JOHN J. McDONOUGH, ET AL.,
PETITIONERS,

v.

TALLULAH MORGAN, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents Tallulah Morgan, et al., black parents and their children enrolled in the Boston public schools, oppose the petition for certiorari of John J. McDonough, et al., the Boston School Committee and Superintendent of schools.

FILED THROUGH POOR COPY

Argument

The District Court in this case faced the task of desegregating a school system enrolling 80,000 students in about 200 schools (A. 177; 379 F. Supp. at 459[1]). The Petitioner had intentionally engaged in many unconstitutional practices — including student segregation, teacher segregation, and discriminatory resource allocation — which affected "all of the city's students, teachers and school facilities". 379 F. Supp. at 482. The Petitioners also evaded and obstructed enforcement of a state desegregative statute. 379 F. Supp. at 418-20, 440-41, 452-55, 477, 479-80. The Petitioners made plain that they would do nothing to promote orderly desegregation not expressly ordered by the Court (A. 47, 66, 200-01) and resisted every attempt to enlist help from others (A. 42-46, 48-51, 52-54). After repeatedly defaulting in their duty to approve a desegregation plan (A. 63-67, 72-73), they finally submitted a freedom of choice plan which they knew would not work (A. 10-13, 46-47). Meanwhile, some white adults and students resisted desegregation by means including violence (A. 63-65).

The District Court expressly disclaimed any power to impose educational policies on the Boston public schools (A. 74). It shaped a plan under which schools varied from 30% white to 95% white and 21,000 students were bused (as compared to 17,000 under the previous State Plan and more than 30,000 using transportation before desegregation began). (See description in part 1, below.) The court's plan did go beyond mere transportation: it used magnet schools to promote voluntary desegregation

---

[1] This method of citation will be used here for the District Court's decision finding constitutional violations, *Morgan* v. *Hennigan*, 379 F. Supp. 410 (D. Mass.), *aff'd*, 509 F.2d 580 (1 Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

(A. 84-85), provided for the equalization of facilities and programs (A. 82-83), and called for the involvement of parents, local colleges and experts to help make the plan work peaceably and effectively (A. 106-12). These measures were reasonable means to proper ends, and hence within the District Court's discretion. The basic — and erroneous — premise of this Petition's attack on them is that a desegregation court's power is limited to ordering busing, and that attempts to deal with other racial discrimination in the schools and to forestall violence and obstruction are forbidden even on a record such as this one.

This case differs from other desegregation litigation only in the unusual resistance the District Court's orders have encountered from the Petitioner and others, and in the unusually careful analysis of the District Court (A. 69-115) and Court of Appeals (A. 2-54). Indeed, Chief Judge Coffin's discussion (A. 38-42, 46-65) of the claims pressed here by the Petitioners is itself the best answer to the Petition. There is no occasion for this Court to depart here from its practice of not reviewing the details of desegregation plans.

1. The Lower Courts Disclaimed Any Power to Seek Educational Improvement for Its Own Sake.

At the very outset of its analysis of the principles governing remedies for segregation, the District Court stated (A. 74):

> "The plan which the court adopts as a remedy in this case does not rest on any supposed constitutional right of a student to attend a school that has a particular ethnic composition, or whose ethnic composition matches that of the school system as a whole . . . . Nor does the plan reflect any imagined independent

THROUGH POOR COPY

> constitutional power of the court to decide what educational policies are desirable for the public school system of the City of Boston. Education is a matter entrusted initially to elected local authorities and appointed state authorities."

The court's plan (A. 116-99) keeps well within the principles laid down in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). It divides Boston into eight contiguous community school districts, and a ninth non-geographic district containing magnet schools (A. 118-77). The districts range from 40% white to 95% while in projected student population (A. 151, 157), and individual schools could vary from 30% white to 95% white (A. 180). Compare, e.g., *Swann*, 402 U.S. at 9, 22-25; *United States* v. *Scotland Neck City Bd. of Educ.*, 407 U.S. 474, 489-90 (1972). (If East Boston is excluded (see A. 90-91), this last range shrinks to 30-70% white (A. 37-38).) The pre-existing grade structure (K-5, 6-8, 9-12) is preserved (A. 103, 121). About 21,000 students are to be bused, for periods averaging 10-15 minutes each way and in every case less than 25 minutes (A. 184). This compares to the busing of 17,000 under the previous plan, originally imposed under state law (A. 62-63, 185; *School Committee of Boston* v. *Bd. of Educ.*, 1973 Mass. Adv. Sh. 1315, 302 N.E.2d 916), and to the more than 30,000 students using public transportation or school buses under the segregated system (A. 92).

The District Court's few references to educational quality were for limited and proper purposes, as appears when they are put in context (parts 2 and 3 below). For example, experience in this system (379 F. Supp. at 429-32) as elsewhere teaches that magnet schools must have educationally attractive programs if they are to effect voluntary desegregation. Similarly, desegregation courts

are properly concerned with the equalization of facilities and services in previously black and white schools, and with the avoidance of educationally disastrous or impossible remedies. E.g., *Wright* v. *Council of the City of Emporia*, 407 U.S. 451, 465-67 (1972); *Swann, supra*, 402 U.S. at 18-19, 30-31; *Brown* v. *Bd. of Educ.*, 349 U.S. 294, 300-01 (1955).[2] As the Court of Appeals said of the advisory role of committees (A. 51):

> "Attention to educational programs from the perspectives of banning active discrimination, assuring equal educational opportunity, meeting the effects of past discrimination, and alleviating the transition to desegregation is obviously a proper goal needing no justification. While better quality education as a general goal is beyond the proper concern of a desegregation court, we do not view the court's instructions to be divorced from its efforts to devise an effective plan of desegregation."

Both the District Court and the Court of Appeals, in short, properly understood their role.

2. Measures Challenged by the Petition Directly Promoted Desegregation of Student Assignments.

Although the Petition (pp. 10, 19) asserts that requiring "thirty-five percent of the 1975-1976 entering class to the examination schools be black or Hispanic (A. 162) is likewise an educational decision", it was ordered by the District Court solely to desegregate schools previously

[2] The Petitioners themselves relied heavily on educational techniques (A. 9-13) and attacked plaintiffs' plan in the District Court as "a student reshuffling plan which has no educational programs". Record Appendix on Appeal, School Committee volume, p. 58.

D THROUGH POOR COPY

overwhelmingly white (A. 100; 379 F. Supp. at 466-68). The reasons for this approach — including the absence of desegregative alternatives, and the reliance of Petitioners on an unvalidated entrance examination with racially exclusive effects — were painstakingly set forth (A. 38-42, 99-104). The lower courts renounced any intention to impair the vitality of these schools (A. 41-42) and rejected a proposal to alter them on grounds unrelated to discrimination (A. 103 n. 17).

The use of magnet schools to promote voluntary desegregation (A. 84, 158-77) was plainly desegregative, vigorously urged by the Petitioners (A. 10-12), and supported by authority. E.g., *Hart* v. *Community School Bd.*, 512 F.2d 37, 54 (2nd Cir. 1975); 20 U.S.C. § 1713(f); Mass. G.L. c. 71, §§ 37I-37J. The Petition's assertion (p. 16) that the District Court improperly selected the programs to be used to make some schools magnetic, since "there had been no default by the petitioners in this area", is baseless. First, the Petitioners *had* defaulted in the magnet school area, both by failing to carry through on promises to desegregate new schools under state law with magnet techniques (379 F. Supp. at 429-32), and by submitting a wholly unrealistic magnet plan to the District Court (A. 12 & n. 10). Second, failure in every particular area is beside the point. In light of the Petitioners' numerous defaults in other areas (e.g., A. 13, 46-47, 53, 63-67, 72-73, 93) and their avowal that they would take no desegregative measures not specifically ordered (A. 66, 200-01), the lower courts were not required to swallow their proposals without examination. See *Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 207-10 (1973). The courts, of course, had a duty to see that less effective remedies were not adopted when better ones were available. *Green* v. *County School Bd.*, 391 U.S. 430, 439 (1968). Third, the District Court *did* adopt the Petitioners' proposals

at all but five or six of the 26 magnet schools (A. 47 n. 43, 169-74), resorting to modifications only "for the purpose of enhancing the desegregative power of the schools as magnets" (A. 169). Fourth, the Petitioners did not object in the District Court to the court's power to specify programs, or to the specific programs required (A. 48).

The involvement of local colleges and universities at the magnet schools (A. 48-49, 84, 166-68) likewise served a desegregative function by making those schools more magnetic, and was appropriate in view of past School Committee defaults. The District Court only ordered the Petitioners to negotiate in good faith with the colleges, without imposing specific terms (A. 109-10, 164), and made clear that there was no intention to usurp the proper role of the School Department (A. 163, 204-05). Involving colleges helped insure that the District Court itself would not have to deal with matters beyond its expertise should the magnet programs not succeed (A. 49-50). And much of the funding used by the colleges comes from the state defendants, who support the District Court's order (A. 49).

The retention of experts to help monitor implementation (A. 53-54, 179, 181) was also directly related to desegregation. Courts routinely appoint experts to help draft desegregation plans. E.g., *Swann*, 402 U.S. at 8-11; *Hart* v. *Community School Bd.*, 383 F. Supp. 699, 764-67 (E.D. N.Y. 1974), *aff'd*, 512 F.2d 37 (2nd Cir. 1975). Here, the District Court's plan left to school officials the assignment of students to specific schools within the community school districts (A. 95 n. 11, 179-83). The time was short (A. 196-97), and failure or evasion could have led to segregative assignments or total confusion. It was only sensible to keep on hand the experts familiar with the plan. The Petition's implication (pp. 10, 20) that the experts were

THROUGH POOR COPY

to make educational policy decisions is unfounded. The one case in which the experts were empowered to make *any* decisions was during an emergency in the assignment process caused by the Petitioners' violation of court orders (A. 53) — and even then immediate court review was provided (A. 53-54). That matter is now moot (A. 54), and the experts have merely a monitoring and advisory role.

3. Measures Challenged by the Petition Secured Enforcement of the District Court's Plan and the Removal of Lingering Discrimination.

A desegregation court's power is not limited to the announcement of a student assignment plan. It can also take measures to ensure that the plan will actually be followed. See, e.g., *Griffin* v. *County School Bd.*, 377 U.S. 218, 232-34 (1964); *United States* v. *Barnett*, 376 U.S. 681 (1964). And it can remove racial discrimination within the school system. E.g., *Gilmore* v. *City of Montgomery*, 417 U.S. 556, 571 (1974) (extracurricular activities); Swann, 402 U.S. at 18-20 (extracurricular activities, building maintenance, equipment distribution, teacher segregation); *Rogers* v. *Paul*, 382 U.S. 198 (1965) (access to courses); *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637 (1950) (segregation within school); see *Wright* v. *County of the City of Emporia*, 407 U.S. 451, 465 (1972) (facilities). Congress has also recognized that desegregation usually involves more than transferring students, by funding remedial services, teacher training, supportive services, and the like. 20 U.S.C. § 1606(a). Nothing could be more short-sighted than to argue that a court's power to wipe out the dual school system "root and branch" extends only to busing plans and the like, and does not include the power to remove ancillary discrimination and to promote effective and orderly compliance.

The exercise of this power was particularly appropriate here, and did not even approach an abuse of discretion or a case requiring this Court's attention. The Petitioners' systematic obstruction of desegregative duties imposed by both state and federal law foreboded enforcement problems (A. 13, 46-47, 63-67, 72-73; 379 F. Supp. at 418-20, 440-41, 452-55, 477, 479-80).[3] The Petitioners expressly denied any affirmative duty to do anything not specifically ordered by the court, in plain defiance of *Swann*, 402 U.S. at 15. (A. 46-47, 66, 200-01). The violence that accompanied interim desegregation measures (A. 63-65; *United States* v. *Griffin*, 525 F.2d 710 (1st Cir. 1975)) clearly showed the need for measures promoting peaceable desegregation. Discrimination in the Boston public schools, moreover, was not limited to segregation: black students were subjected to inexperienced teachers, were excluded from the "elite" examination schools, and were channelled into the more outmoded branch of a dual vocational training system. (A. 29; 379 F. Supp. at 461-63, 466-69).

These concerns warranted involvement of colleges and universities, to the extent such involvement went beyond the assistance to magnet programs already discussed. See 45 C.F.R. § 181.4(c)(9) (subsidies for university involvement). First, that involvement gave promise to the court and community that expert assistance would be at hand during any difficulties of desegregation, and that neutral outsiders would notice any evasion or obstruction (A. 75-76, 82-83). These tasks could not be entrusted to the Petitioners, who refused to do anything but follow specific orders. Second, the colleges were to help in the "equalization of services at schools that have been unequal" (A. 82; see 108) and in the avoidance of discrimi-

[3] See U.S. Comm'n on Civil Rights, Desegregating the Boston Public Schools: A Crisis in Civic Responsibility (1975).

ED THROUGH POOR COPY

natory or racially stereotyped instruction (A. 83), plainly proper goals (A. 83) (citing cases).

The requirement that each school have a principal or headmaster (A. 119) was proper for similar reasons: it ensured that there would be someone in charge to navigate the shoals of desegregation, and to guide in the equalization of programs (A. 51-52, 75, 83). In the past, elementary school districts containing several schools but only one principal had been manipulated to segregate students within the district (A. 52). The court's decision to avoid multi-school districts in its plan necessarily required new administrative arrangements. Cf. *Swann*, 402 U.S. at 27-28. The Court of Appeals made clear that the plan should not be construed to require equal salaries for principals of small and large schools (A. 52).

The plan's provision for multiracial committees including parents, students and other citizens (A. 187-93) is a traditional part of desegregation plans (A. 50, 112), in this instance shaped with the help of the Community Relations Service of the Justice Department (A. 111). The Petition's suggestion (pp. 10, 18) that these committees were given any power to implement their views is incorrect (A. 50-51, 188). Their function is to monitor compliance and report problems (A. 50-51, 83, 111-12, 188, 192). Since disruption had already occurred in 1974 (A. 63-65), and discriminatory hiring had resulted in an overwhelmingly white school staff (379 F. Supp. at 463-66), the appointment of multiracial committees promoted a peaceful transition to a system in which people of all races participate on equal terms (A. 51, 112; *Brown* v. *Board of Educ. of Bessemer*, 432 F.2d 21, 24 (5 Cir. 1971)).

This lengthy survey of the measures to which the Petition objects confirms the obvious: District Courts have a variety of remedies to choose from, and must be granted considerable discretion to mold the remedy to the local

circumstances. E.g., *Hills* v. *Gautreaux*, 44 U.S.L.W. 4480, 4484, 4487 (1976). Remedies must be given a chance to prove themselves over time. *Bradley* v. *Richmond School Bd.*, 416 U.S. 696, 722-23 (1974); *United States* v. *Montgomery County Bd. of Educ.*, 395 U.S. 225, 235 (1969). None of the Petition's objections to the details of the District Court plan warrants review here.

4. THE COURT OF APPEALS DECISION HERE DOES NOT CONFLICT WITH *Keyes* v. *School Dist. No. 1*, 521 F.2d 465 (10th Cir. 1975).

The Petition errs in its claim (pp. 11-12) that the First Circuit's decision in this case is inconsistent with the rejection of the "Cardenas Plan" for bilingual education in *Keyes* v. *School Dist. No. 1*, 521 F.2d 465 (10th Cir. 1975), *cert. denied*, — U.S. — (1976) (No. 75-701). The court there did not hold that segregation remedies "must be limited functionally to desegregation" (Petition, p. 12); on the contrary, it recognized that the District Court *could* require the schools to help Hispanic children learn English to the extent that this was necessary to promote effective desegregation by enabling them to learn together with white children. 521 F.2d at 481-82. Thus, the Court remanded "for a determination of the relief, if any, necessary to ensure that Hispanic and other minority children will have the opportunity to acquire proficiency in the English language." 521 F.2d at 483. Such relief would far exceed anything in question in Boston.

What the *Keyes* court did object to was an elaborate bilingual plan extending to "matters of educational philosophy, governance, instructional scope and sequence, curriculum, student evaluation, staffing, noninstructional service and community involvement", and including such matters as education for three-year olds and adults and clothing

ED THROUGH POOR COPY

for poor children. 521 F.2d at 480-81. The court concluded that, in the absence of any finding that the defendants' treatment of Hispanic students constituted illegal segregative conduct or resulted from such conduct, the Cardenas plan went far beyond what was needed to ensure effective desegregation. 521 F.2d at 482. It could be supported only on the theories, which the court rejected, that the Constitution entitles minority students "to an educational experience tailored to their unique cultural and developmental needs", or that the Denver authorities had failed to comply with *Lau* v. *Nichols*, 414 U.S. 563 (1974). 521 F.2d at 482-83. No such theories are involved here.

This case is not like *Keyes*, but rather resembles the numerous desegregation cases in which this Court has found no occasion to review the District Court's exercise of discretion. The measures challenged by the Petition were limited, and in every instance were directly related to the proper goals of a desegregation court.

5. The Petition Attempts To Assert Claims Not Raised on the Record in This Case.

The Petition's challenge to the District Court's power to designate the programs of magnet schools (pp. 10, 16) was never raised in the District Court (A. 48). The Petition's objection (pp. 10, 18) to the appointment of committees by the District Court was also not presented to that court; the Petitioners' only objection there was to any vesting of substantive powers in the committees (Record Appendix, Court of Appeals, School Committee volume, pp. 111, 173), and the District Court made clear that no such vesting was intended (A. 188). The Petition's present challenge to Dean Dentler (pp. 19-20) differs from those rejected below (A. 42-45), which the Petitioners have not sought to bring here. The Petition's disagreements (p. 13)

with subsequent orders of the District Court, appeals from which are now pending in the Court of Appeals, cannot be raised in this proceeding.[4]

6. No Issue Warranting This Court's Consideration Is Raised.

The issues raised by the Petition have no general import, but simply turn on whether particular remedial orders were adequately supported on this record. There is no question of a claim that courts are empowered to require good education as a goal in itself: both lower courts disavowed any such power (A. 51, 74). Nor can it be argued that desegregation courts are empowered only to put students of different races into the same school building by compulsory means: under some circumstances, promoting voluntary desegregation through magnet schools, preventing discrimination within desegregated schools, and securing orderly and effective compliance with court orders is plainly proper. Whether the District Court's orders went too far is an issue which can be decided only in view of the circumstances of this case, and an answer will give little help to other courts in other circumstances. Cf. *Swann*, 402 U.S. at 31.

The broad discretion granted District Courts in this area likewise counsels against review. E.g., *Swann*, 402 U.S. at 12-13, 15-16, 28; *Gilmore* v. *City of Montgomery*, 417

[4] The District Court found it necessary to give further relief because of continuing discrimination and segregation at South Boston High School, which had the effect of driving black students from that school. Restoration of the school's facilities was adopted as part of a limited receivership in order to draw those students back and to provide constructive common activities which might alleviate destructive disputes. Transcript, 12/9/75, pp. 68-115; Order Concerning South Boston High School, 12/9/75; Supplementary Findings and conclusions on Plaintiffs' Motion Concerning South Boston High School, 12/16/75.

FED THROUGH POOR COPY

U.S. 556, 571 (1974). All reasonable methods are available to formulate an effective remedy. *Hills* v. *Gatreaux*, 44 U.S.L.W. 4480, 4484 (1976). Especially where the relatively peripheral matters raised by the Petition are concerned, "The framing of decrees should take place in the District rather than in Appellate Courts." *Int'l Salt Co.* v. *United States*, 332 U.S. 392, 400 (1947). When equities are balanced in such a complex case, it is always possible to pick words out of context and argue that, by themselves, they reflect erroneous standards. "Considering the pressure under which the court was obliged to operate we would not expect that all inconsistencies and apparent inconsistencies could be avoided." *Swann*, 402 U.S. at 24 n. 7. In this case, however, the District Court arrived at an extraordinarily consistent and moderate plan, based on sensitive consideration of all relevant factors and in full compliance with this Court's decisions. The Court of Appeals, after its own detailed analysis, found the desegregation plan well within the District Court's power.[5]

To uphold the Petition's claims, moreover, would drastically impair desegregation in Boston and elsewhere. The conclusion would be drawn that a desegregation court's power is limited to ordering busing. Some of the parts of the District Court's plan which have proven most attractive to parents and students would be destroyed. And the outside help—parents, colleges, and experts—which is helping make the plan work would be removed from the scene, just as the Petitioners attempted below to remove the masters and experts (A. 45-48; 401 F. Supp. 270). For other obstructive tactics, see 379 F. Supp. at 418-20,

---

[5] There has been no shortage of appellate review in this case. *Morgan* v. *Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); 509 F.2d 599 (1st Cir. 1975); 509 F.2d 618 (1st Cir. 1975); 523 F.2d 917 (1st Cir. 1975); ___ F.2d ___ (1st Cir. 1976) (No. 75-1097). Five more appeals are pending below.

440-41, 452-55, 477, 479-80; A. 13, 46-47, 53, 63-67, 72-73, 93. Twenty-two years after *Brown* v. *Bd. of Educ.*, 347 U.S. 483 (1954), the Petitioners' campaign to maintain intentional separation of the races in the Boston public schools should come to an end. What is needed now is not further appellate proceedings, but faithful implementation of the constitutional rights of the children of Boston.

Conclusion

Public and private misconduct, amounting at times to challenges to the rule of law itself, have marred school desegregation in Boston for almost two years. And the difficulties resulting from this resistance have been much publicized.

These Petitions, however, present questions that are unworthy even of note, much less certiorari. In a case that is unremarkable except for the law enforcement issues which the Petitions do not present, this Court is asked, in essence, to decide whether the district courts have discretion to fashion equitable remedies for constitutional violations; and secondly, to decide whether, after the painstaking exercise of that discretion and meticulous affirmance by the Court of Appeals, the relief granted is to be set aside because it has aroused community opposition and because it is inconvenient and expensive to the Petitioners who must provide it.

We treat the Petitions in Nos. 75-1441, 75-1445 and 75-1466 individually, of course, but brief consideration of them together illustrates the wisdom of this Court's often reiterated reliance upon the discretion of the lower courts with respect to the details of school desegregation remedies.[6]

---

[6] Indeed, with the possible exception of *Milliken* v. *Bradley*, 418 U.S. 717 (1974), a school desegregation remedy case different from prior ones in kind rather than degree, this Court has not

LEED THROUGH POOR COPY

The Boston School Committee (No. 75-1445), whose rejected plans minimized desegregative pupil assignments in favor of educationally innovative magnets (A. 10-13), complains here that the District Court, as affirmed by the Court of Appeals, abused its discretion to the extreme of reversible error when it required educational components in order to enhance the realistic working of the plan and to equalize educational opportunities. After prolonged abdication of its responsibilities, this Petitioner argues that its prerogatives have been infringed and that the District Court, while empowered to require desegregation, may not order such related measures as are, in the careful exercise of the Court's discretion, reasonably necessary both to the effectiveness of the plan and to cure the effects of prior violations.

The Home and School Association (No. 75-1466) argues for the least possible degree of actual desegregation (contrary to this Court's opposite command in *Davis* v. *Board of School Commissioners*, 402 U.S. 33, 37 (1971), and *Hills* v. *Gautreaux*, — U.S. —, 44 U.S.L.W. 4480, 4484, (No. 74-1047, decided April 20, 1976) by an analysis reminiscent of the discredited "each school is an island" approach to the issue of the scope of the violation. This approach, properly characterized elsewhere as "inscrutable"[7] and disavowed by this Court in *Keyes* v. *School District No. 1*, 413 U.S. 189, 200 (1973), conveniently ignores a critical finding made by the District Court before this Petitioner became a party to this case, namely, that the defendants' segregative practices and their effects actually pervaded

once since its opinions in the *Brown* cases curtailed district court-ordered relief. Reversals of appellate curtailments of district courts' relief and enlargements of district courts' remedies are more familiar. See, for example, *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); and *Green* v. *County School Board*, 391 U.S. 430 (1968).

[7] *United States* v. *Texas Education Agency*, 467 F.2d 848, 874 (5 Cir. 1972).

the entire system. That finding necessitated comprehensive relief.

Intractable problems of practicability may limit desegregation, and have to some extent in this case, but it would be manifest error for a district court to strain to afford minimum relief for a maximum violation.

The Mayoral Petitioner (No. 75-1441) pays lip-service to comprehensive desegregation and acknowledges, as he must, the obligation of the District Court to require it. The Petitioner could not deny that the District Court carefully avoided—in design (A. 74, 78) and result (A. 19-20, 38) —reliance upon racial ratios, such as this Court cautioned against in *Swann*, 402 U.S. at 24. His arguments are based on the erroneous premise that the Masters Plan would have provided systemwide desegregation—a premise based on projections which the District Court found to be invalidated by later data (A. 87-89) and which the Court of Appeals called "clearly erroneous" (A. 14 n. 13). To this premise, the Petitioner adds the equally incorrect assertion that the District Court refused "to consider factors such as the extent of busing, the cost, community acceptance, and the potential for resegregation" (Petition, p. 2).

As we show in our Brief in opposition to the Petition in No. 75-1441, the Courts below gave plenary consideration to permissible limitations upon desegregation plans, and the Mayoral Petitioner's present assertions are unsupported by the record. The point here, however, is that these Petitions present a hodge-podge of overlapping and inconsistent arguments (desegregate if you must, but leave the education to us; minimize desegregation; improve education but disregard the lower courts' findings in order to resuscitate a less effective, assertedly more convenient, plan) illustrate as well as any words of ours can that this Court is well advised to leave the resolution of such remedial disputes to the lower courts.

THROUGH POOR COPY

School desegregation plans that are manifestly impracticable, or that are arrived at by procedures that are fundamentally unfair to the litigants, perhaps should be reviewed. Rarely, however, has a school desegregation district court listened so often and so patiently to the numerous parties as this one has listened; rarely has a court of appeals so carefully reviewed so many challenges to a district court's handiwork. And although there has been some resistance and some continuing default by public officials, the plan ordered by the District Court, while it falls short of maximum practicable desegregation, realistically promises to work now.

Certiorari should be denied.

Respectfully submitted,

LAURENCE S. FORDHAM, J. HAROLD FLANNERY,
JOHN LEUBSDORF
(FOLEY, HOAG & ELIOT);
ROBERT PRESSMAN, ERIC E. VAN LOON
(CENTER FOR LAW & EDUCATION);
RUDOLPH F. PIERCE
(KEATING, PERRETTA & PIERCE);
NATHANIEL R. JONES (N.A.A.C.P.)

FOLEY, HOAG & ELIOT
10 Post Office Square, Boston, Mass. 02109